

Rec'd 1/5/99 @ 1:30 p.m.
Ar. Peter Bragg

FEDERAL COMMUNICATIONS COMMISSION

In Re Applications of:) MM DOCKET No.: WT 94-147
JAMES A. KAY, JR.)
License of One Hundred Fifty-)
Two Part 90 Licenses in the)
Los Angeles, California Area)

Volume: 13
Pages: 1019 through 1173
Place: Washington, D.C.
Date: December 22, 1998

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In Re Applications of:) MM DOCKET No.: WT 94-147
JAMES A. KAY, JR.)
License of One Hundred Fifty-)
Two Part 90 Licenses in the)
Los Angeles, California Area)

Suite A-363
FCC Portals Building
445 - 12th Street, N.W.
Washington, D.C. (Zip Code?)

Monday,
December 21, 1998

The parties met at 10:12 a.m., pursuant to the
notice of the Judge.

BEFORE: HON. JOSEPH CHACHKIN
Administrative Law Judge

APPEARANCES:

On behalf of James A. Kay, Jr.:

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EXHIBIT	RECEIVED	REJECTED
WTB 328	1022 in part	1022 in part
WTB 329	1022 in part	1022 in part
WTB 343	1023 in part	1023 in part
WITNESS		PAGE
JAMES KAY		1026

(10:12 a.m.)

328, pages 71, line 6, through page 75, line 9, are received. Pages 85, lines 21 through 25, are received. Pages 87, line 15, through page 98, line 25, is rejected. Page 100, line 24, through page 11, line 16, is rejected. Page 112, line 9, through page 132, line 24, is received. Page 140, line 9, through page 141, line 12, is received. Page 149, line 23, through page 150, line 10, is received. Page 184, lines -- did I say page 140, line 9? Page 141, line 12, is received. I think I might have said that. Page 149, line 23, through page 150, line 10, is received. Page 184, lines 1 through 21, is received. Page 186, line 25, through page 187, line 7, is received. Page 193, line 1, through page 199, line 20, is received.

With respect to WTB Exhibit 329, page 238, line
 yh page 239, line 16, is received. Page 241, line
 yh page 246, line 16, is received. Page 261, line
 yh page 263, line 8, is received. Page 303, line
 a page 305, line 16, is received. Page 310, lines
 are received. Page 313, line 14, through page 314,
 s received. Page 326, line 11, through page 329,
 s received. Page 335, line 7, through 339, line
 jected. Page 339, line 20, through page 355, line

1 25, is received. Page 362, line 3, through page 367, line
2 3, is received. Page 367, line 25, through page 372, line
3 19, is received.

4 With respect to WTB Exhibit 343, the following
5 portions will be received: Page 1, the first full
6 paragraph; page 4, the first full paragraph through the
7 second line; on page 5, and page 17, the paragraph under
8 "Conclusion," and pages 21 through 23.

9 That's it. Mr. Kellett, Is the witness here?

10 MR. KNOWLES-KELLETT: He is, Your Honor. He's
11 coming through Security. I apologize. I took a wrong route
12 getting here. I didn't realize all the left turns I wasn't
13 allowed to make.

14 MR. SCHAUBLE: Your Honor, we have a couple of
15 exhibits that --

16 JUDGE CHACHKIN: All right.

17 MR. SCHAUBLE: These are the February 16, 1994
18 letters that we've marked for the 1994 letters that were the
19 subject of some discussion yesterday.

20 JUDGE CHACHKIN: All right. Why don't we take it
21 up right now? These are apparently the missing letters.
22 Why don't you identify the material that you want off.

23 MR. SCHAUBLE: Your Honor, I ask to be marked for
24 identification as WTB Exhibit Number 348 a letter dated
25 February 16th on the letterhead of Brown & Schwaninger,

1 addressed to the Federal Communications Commission,
2 Gettysburg, Pennsylvania, Attention: W. Riley
3 Hollingsworth.

4 JUDGE CHACHKIN: All right.

5 MR. SCHAUBLE: It is a two-page exhibit, and it's
6 February 16, 1994.

7 JUDGE CHACHKIN: The document described is marked
8 for identification as Bureau Exhibit 348.

9 MR. SCHAUBLE: Your Honor, I ask to be marked for
10 identification as WTB Exhibit 349 a two-page exhibit on the
11 letterhead of the Federal Communications Commission, dated
12 March 1, 1994, addressed to Dennis C. Brown, Esq., Brown &
13 Schwaninger.

14 JUDGE CHACHKIN: The document described will be
15 marked for identification as Bureau Exhibit 349. Are you
16 offering it at this time?

17 MR. SCHAUBLE: Your Honor, I can do that at this
18 time.

19 JUDGE CHACHKIN: Well, why don't you make the
20 offer?

21 MR. SCHAUBLE: Your Honor, at this time I move WTB
22 Exhibits 348 and 349 into evidence.

23 JUDGE CHACHKIN: Any objection?

24 MR. SHAINIS: Your Honor, the only objection I
25 have is a continuation of -- well, first of all, to Exhibit

1 348, no objection whatsoever. To Exhibit 349, again, I note
2 that I think we're going to want to cross-examine Mr.
3 Hollingsworth.

4 JUDGE CHACHKIN: As I've indicated, it's not being
5 received for the truth; merely as a letter which was sent to
6 Mr. Brown.

7 MR. SHAINIS: No. I understand that, but there
8 was testimony yesterday concerning a need for 50 copies,
9 which was presented in the submission letter. I think the
10 only person who can explain that as to the reason for the 50
11 copies would be Mr. Hollingsworth.

12 MR. SCHAUBLE: Your Honor, I think we need to
13 focus -- I mean.

14 JUDGE CHACHKIN: I'm not going to require you to
15 bring the witness in. Mr. Shainis wants to bring him in as
16 a witness, so I don't think on that matter, 50 copies, if
17 there is any justification. I don't think it's a very
18 important matter one way or the other, and I'm not going to
19 make anything of it in my filings, although I think it's
20 worthy to be considered as to whether or not this was a
21 situation where Mr. Kay didn't obey the Commission's
22 request. I don't think it's worthy of anything, frankly,
23 and that's what I'm saying, and I don't intend to make
24 anything of it. If the Bureau wants to pursue it, the
25 importance of it, then they will have to bring him in as a

1 witness.

2 MR. KNOWLES-KELLETT: Mr. Hollingsworth's state of
3 mind is not an issue.

4 JUDGE CHACHKIN: Well, as I say, the question of
5 whether he -- the whole business about 50 copies, as far as
6 I'm concerned, is not something worthy to consider. If the
7 Bureau believes it's a matter of some importance, then I do
8 agree there is a need for him to come and testify as to why
9 he requested 50 copies, because I think it's unreasonable on
10 its face, frankly, requesting 50 copies, which is not
11 consistent with the rules. As a matter of pique by this
12 particular individual, if you want to bring it up as
13 something of some importance, then you're going to have to
14 bring him; otherwise, I'm going to discount the whole
15 matter.

16 MR. SHAINIS: Thank you, Your Honor.

17 JUDGE CHACHKIN: All right. The witness is here,
18 ready to testify, so you can go ahead with your questions.
19 Whereupon,

20 JAMES A. KAY
21 having been previously sworn, was recalled as a witness
22 herein and was examined and further testified as follows:

23 DIRECT EXAMINATION

24 BY MR. SCHAUBLE:

25 Q Good morning, Mr. Kay.

1 A Good morning.

2 Q Mr. Kay, you should have before you a letter dated
3 February 16, 1994 on the letterhead of Brown & Schwaninger,
4 which has been received in evidence as WTB Exhibit 348. Do
5 you have that before you?

6 A Yes.

7 Q Was this a letter written on your behalf by Brown
8 & Schwaninger?

9 A Yes, it is.

10 Q Okay. And did you receive a copy of this letter
11 on or shortly after February 16, 1994?

12 A Yes.

13 Q Okay.

14 A I believe I did.

15 Q Okay. Do you recall whether you received this
16 letter or a prior version thereof prior to February 16,
17 1994?

18 A I don't recall.

19 Q Okay. When you received the letter, did you
20 review it?

21 A I would have read it or scanned through it.

22 Q Okay. Did you ever inform your attorneys that
23 there was anything in this letter that you objected to or
24 disagreed with?

25 A I don't recall.

1 Q Turn to page two of the letter, Mr. Kay. In the
2 first full paragraph on page two do you see that there is a
3 request in there that mentions immunized yourself against
4 any forfeiture action by the Commission or any criminal
5 prosecution?

6 A I see that.

7 Q Were you aware at or around February 16, 1994 that
8 this request was being made to the Commission?

9 A I don't know if I was specifically aware from
10 reading this here. I can only conclude that my attorneys
11 were acting in an abundance of caution on my behalf.

12 Q Okay. Mr. Kay, please direct your attention to
13 what's been received in evidence as WTB Exhibit 349. It's
14 the March 1, 1994 letter from the Commission. Do you have
15 that before you, Mr. Kay?

16 A Yes.

17 Q Was this letter forwarded to you by your attorneys
18 on or shortly after March 1, 1994?

19 A I presume so.

20 Q Okay. Now, yesterday there was some testimony
21 concerning a denial of a request for confidentiality. To
22 your understanding, is this the letter to which you believe
23 the Commission denied your request for confidentiality?

24 A I believe it is one of them.

25 Q Can you point to any particular language in this

1 letter in which the Commission denied your request for
2 confidentiality?

3 A It does not specifically say, your request is
4 denied. It says our request does not comply, and it's being
5 treated as a casual request under our rules. By not saying,
6 yes, we will give you confidentiality, it is, on the other
7 hand, a denial, even if it does not say so on its face.

8 Q Okay. Would you also agree that the letter also
9 contemplates that you would have a further opportunity to
10 request confidentiality?

11 A I don't know if I read that into it. I think
12 that's an interpretation.

13 Q I direct your attention specifically to the first
14 sentence of the second paragraph.

15 A This isn't an invitation; they are quoting rules
16 to us. And then the latter part of it says that the
17 Commission assumes no obligation to consider the need for
18 nondisclosure.

19 Q Well, correct me if I'm wrong, Mr. Kay, that it
20 says: Please remember that if no request for
21 confidentiality is submitted under the provisions of the
22 rule, the Commission assumes no obligation to consider the
23 need for nondisclosure. Correct?

24 A That's what it says. However, I know how the
25 confidentiality works. The way they have this is you're

1 supposed package it all up, give them everything you want
2 held confidential, and then the Commission, at its own
3 discretion, will determine whether or not it should be held
4 confidential, at which point in time it's a case of trying
5 to get it back with them while they are intending to release
6 it.

7 Once you have given the information to the
8 Commission, they can just go ahead and release it, at least
9 that's my understanding. We believe they would have to take
10 an active measure to try to prevent that release, including
11 legal action, if necessary, to try to stop it. The
12 Commission is not under any obligation to return it to us if
13 they deny the confidentiality.

14 Q So is it your belief that you have the right to
15 refuse a directive to provide information because of the
16 possibility that the Commission might not grant a request
17 for confidentiality?

18 A I think you're making an interpretation there. We
19 asked for confidentiality, and it was denied. Considering
20 the essence of what you were asking for, not only the
21 absolutely mammoth magnitude, which in discovery, later on
22 in the context of the hearing, what we gave you in response
23 to discovery was the same that was requested under the
24 308(b), and that amounted, sir, to approximately 38,000
25 documents, which took my staff almost three months to put

1 together for you.

2 So what they were asking here for us to do was to
3 supply approximately 38,000 documents. That's how much they
4 requested of that 308(b) because that's what we supplied
5 under discovery, and then to supply this to the Commission,
6 the very essence of my business, 38,000 documents and say,
7 well, the Commission will then consider your request for
8 confidentiality. And if they don't grant it, the essence of
9 my business and my customer's confidential records,
10 including critical security information, will be released to
11 the public or we would have to fight a protracted legal
12 battle with you to keep it from being released and the harm
13 that it can cause.

14 When you asked for that kind of information, I
15 think I should be able to expect a, "yes, we will keep it
16 confidential," without playing some type of a cat-and-mouse
17 game over confidentiality.

18 Q This eventually ended up in Court, didn't it, this
19 question, or am I wrong?

20 A We never had an opportunity to litigate this. If
21 they had given us a subpoena for the documents, we would
22 have been able to challenge their request for the
23 information. Basically, Your Honor, this hearing is the
24 only legal opportunity I have had to challenge their demand
25 for the documents under the 308(b). This is it, Your Honor.

1 JUDGE CHACHKIN: I thought I read somewhere where
2 there was some kind of --

3 MR. KNOWLES-KELLETT: Your Honor, what ended up in
4 Court was a litigation over this FOIA request by Mr. Kay to
5 determine what was underlying this. There was also a
6 Section 1983, a Bivens action against Mr. Hollingsworth and
7 a couple of others.

8 JUDGE CHACHKIN: All right. Let's proceed.

9 BY MR. SCHAUBLE:

10 Q Mr. Kay, please direct your attention to WTB
11 Exhibit 12. That's the June 10, 1994 letter from the
12 Commission. Specifically, the third paragraph, direct your
13 attention to the first sentence, which reads: "In regard to
14 Item 5, information submitted will be kept by the
15 Commission, and there will be one original and one copy of
16 the information need be filed." Do you see that?

17 A Yes, I see it.

18 Q Okay. Now, it's a fact that after you received
19 that assurance, you still refused to provide the
20 information. Correct?

21 MR. KNOWLES-KELLETT: Objection as to the form of
22 the question. The way it was filed -- it is a fact that
23 there was no foundation for that.

24 JUDGE CHACHKIN: Overruled. The witness can deny
25 it if he wishes and explain it.

1 THE WITNESS: Could you repeat the question to me?

2 BY MR. SCHAUBLE:

3 Q Sure. It's true that after you received this June
4 10, 1994 letter you continued to refuse to provide the
5 information you were directed to provide about the
6 Commission?

7 A After all the other correspondence with back and
8 forth and other actions by the Commission, my lawyers took
9 that stance, advised me to not submit the information. They
10 did not believe that it would be held confidential in light
11 of all of the actions by the Bureau.

12 Q And, in fact, you told the Commission on
13 June 30 --

14 JUDGE CHACHKIN: June when?

15 MR. SCHAUBLE: June 30, 1994. Turn your attention
16 to Exhibit 15.

17 JUDGE CHACHKIN: What about June 17th?

18 MR. SCHAUBLE: Fifteen, Your Honor.

19 JUDGE CHACHKIN: Pardon?

20 MR. SCHAUBLE: Fifteen, the June 30, 1994 letter.

21 JUDGE CHACHKIN: But there is also a June 13th, a
22 June 17th letter.

23 MR. SCHAUBLE: We understand that. There was some
24 testimony on that yesterday. At this point, my focus is on
25 the June 30, 1994 letter.

1 JUDGE CHACHKIN: All right. It's the 14th, your
2 exhibit. All right. What's your question?

3 BY MR. SCHAUBLE:

4 Q And turning to page three of the letter, Mr. Kay,
5 on the top of the page, --

6 A Which exhibit are we on, 15?

7 Q Fifteen. You told the Commission that there was
8 no date subsequent to January 1, 1994 for which the
9 submission of the requested information would be convenient.
10 Correct?

11 JUDGE CHACHKIN: What do you have reference to,
12 what page?

13 MR. SCHAUBLE: Page three.

14 JUDGE CHACHKIN: Page three.

15 MR. SCHAUBLE: The first full sentence at the top
16 of the page.

17 JUDGE CHACHKIN: All right.

18 MR. KNOWLES-KELLETT: I'll object to the question.
19 The letter speaks for itself.

20 JUDGE CHACHKIN: Well, he is just pointing to
21 this. Now you have a question, I assume.

22 BY MR. SCHAUBLE:

23 Q The question: Therefore, Mr. Kay, it's correct
24 that you refused to provide the Commission with the
25 information that you were directed to provide.

1 MR. KNOWLES-KELLETT: Objection. The letter
2 speaks for itself. Your Honor, apparently what Mr. Schauble
3 is doing is reading statements from the letter and asking
4 Mr. Kay whether the sentence states what it states.

5 MR. SCHAUBLE: Your Honor, part of the problem
6 here is, you know, the witness sort of went off and said
7 certain things, and I think we need to make sure the record
8 is clear on this. I don't want a muddled record on this.

9 JUDGE CHACHKIN: Now, what is your question?

10 MR. SCHAUBLE: Is it correct that in this letter
11 he continued to refuse to provide the information he was
12 directed to provide?

13 MR. SHAINIS: Objection.

14 JUDGE CHACHKIN: Don't use the letter; just say as
15 of June 30, 1994.

16 BY MR. SCHAUBLE:

17 Q Is it correct, Mr. Kay, that as of June 30, 1994
18 you continued to refuse to provide the information that you
19 were directed to by the Commission?

20 A I would say that we took -- my attorneys took
21 legal positions in answer to your request which are clearly
22 elaborated upon in a series of letters to the Commission.

23 MR. SCHAUBLE: Your Honor, I ask that the witness
24 be directed to answer the question.

25 THE WITNESS: In a short answer, yes.

1 BY MR. SCHAUBLE:

2 Q Mr. Kay, you should have a copy in front of you of
3 your Exhibit 347, which is the customer print screens. Do
4 you have those before you, Mr. Kay?

5 A Yes.

6 Q Okay. Now, is it correct that these records
7 reflect a printed version of information that you or certain
8 of your employees could view on a computer screen?

9 A Basically, yes.

10 Q Okay. And can you briefly describe the process by
11 which these paper records were generated?

12 A These particular ones?

13 Q Yes.

14 A This March of 1995, in answer to your
15 interrogatories, I had Graig Sobel, a skilled computer
16 programmer, come in and modify the computer program that I
17 had, that allowed us to print these reports, and I had
18 someone sit down and proceed to print them out.

19 Q Okay. So it's your understanding that Graig Sobel
20 came in on or shortly before March 1995 to create the
21 capability to print these reports.

22 A He came in -- I was instructed to produce these to
23 answer the Commission's interrogatory. I asked Graig Sobel
24 to come in and assist my staff in producing the request.
25 Exactly what he did, how he did it, or what he did, I was

1 not -- I either did not know or do not remember exactly
2 precisely what he did except that the reports were then
3 produced. I don't know exactly what he did, but he was
4 involved.

5 Q Okay.

6 JUDGE CHACHKIN: I'm trying to understand
7 something. At the time of the Commission's 308 request in
8 response to the Commission, what data did you have as to
9 your loading information, customers and how many? I mean,
10 in response to the Commission request. Now, you've
11 mentioned that Mr. Sobel had to modify your computer
12 program, so I'm asking you, before the modification,
13 assuming that you didn't have the problem of confidential
14 communication or anything like that, could you at that time
15 have produced the information the Commission wanted without
16 having to modify or change your system.

17 THE WITNESS: Well, I would have to go a little
18 bit in depth on that, Your Honor, which I'll do right now
19 for you.

20 JUDGE CHACHKIN: All right.

21 THE WITNESS: In approximately 1988-89 I put in a
22 computer system which was based on the ZENIX format or
23 operating system, which is similar to the UNIX operating
24 system. This system -- we placed upon it a billing program
25 that was hand-wrote, made by Graig Sobel, using a program

1 called Fox or Fox Crow or Fox Plus, and it's a relational
2 data base that Graig Sobel writes in. Over a period of
3 years this system, which -- it originally wrote in a DOS
4 format but adapted to this ZENIX system and operated on my
5 computer, it underwent many modifications and changes and
6 additions over the following years. We were using that in
7 January of 1994.

8 Its primary purpose was billing, to be able to
9 custom bill our customers, so it contained customer names,
10 addresses, phone numbers. Not all, but most of the
11 information that's on the customer file, its primary purpose
12 was billing, so it had year-to-date billings, last-bill
13 amounts, amounts due, and it had primarily that. The
14 information for mobiles, controls was on there primarily as
15 a convenience to us, and it was not in any way audited or
16 kept up to date. We put in what the customer originally
17 started with, and oftentimes there would be changed billing
18 amounts if they added -- your bills may not have even
19 necessarily been updated that much. It was, therefore, a
20 convenience as to prepare to make some type of public
21 record.

22 In January 17th of '94, the North Ridge
23 Earthquake did severe damage, including severe damage in our
24 computer system, the ZENIX system. It ultimately failed
25 afterwards, with a significant loss of data. At that time,

1 our ZENIX system, even operating, our ZENIX system did not
2 produce these -- reports other than on the screen. There
3 was no printout for it.

4 Everything that we did had to be done manually by
5 having Sobel, Graig Sobel, come in and do it for us, but it
6 met our needs because we didn't need to generate these
7 reports more than to take a look at a screen, look up,
8 primarily -- how many mobile units people had, but to look
9 at what frequency they are on for service purposes. We
10 didn't need to know how many mobiles the customer had, but
11 if they called and said the system wasn't working, we just
12 needed to know what frequency they were on, what system they
13 were on, what mountain top they were on to have some effects
14 of looking at the problem. We didn't need that information,
15 and, therefore, I -- than anything else.

16 Subsequent to the damage to our computer, we
17 received the 308(b) letter. There was no way with the
18 system, even if was functioning, let alone damaged, could we
19 have answered readily the Commission's 308(b) request.
20 Ultimately, the system, our computer system, was replaced, I
21 believe it was April of 1994, with a new computer operating
22 on the DOS format. I could not get anybody to come out and
23 service my ZENIX system. It was replaced by Graig Sobel.
24 He had the program so he could put them on the DOS system.
25 We then had to transfer whatever data we could salvage for

1 the old system.

2 And one of my gals took easily two to three months
3 to reenter a lot of customer information onto the new DOS
4 system. We could not have produced these reports until --
5 even if all objections aside and the Commission granted
6 confidentiality, it would have been a near physical
7 impossibility to answer their 308(b) letter until easily the
8 end of the third, if not the fourth, quarter of 1994. And
9 that would still require if, as I project, staff available
10 and get Graig Sobel and people to help us with it being able
11 to do this.

12 Ultimately, their request, if we had it answered
13 fully, would have been the same as the discovery that we did
14 produce, approximately 38,000 documents, maybe less a few
15 things. They still would have been in the mid-thirty-
16 thousand range of documents that they were demanding from
17 me. It was beyond an astronomical request.

18 JUDGE CHACHKIN: All right. Go ahead.

19 BY MR. SCHAUBLE:

20 Q Mr. Kay, a few follow-up questions on this. Isn't
21 it correct that you never requested an extension of time
22 from the Commission to respond to the 308(b) letter based
23 upon damage suffered from the North Ridge Earthquake?

24 A You were informed of the earthquake very much in
25 one of Brown & Schwaninger's letters. One of the letters

1 from my counsel specifically told you about it and the
2 severe damage and the difficulties we had.

3 Q Is it correct that you never actually requested an
4 extension of time from the Commission based upon the damage
5 from the earthquake?

6 A I believe that extensions were requested by my
7 counsel on at least a couple of cases, including one that I
8 know the Commission denied it. I'd have to look back
9 through here to see the specific basis, but extensions were
10 very definitely requested of the Commission, including one
11 that was very definitely denied.

12 Q Okay.

13 JUDGE CHACHKIN: Wasn't there a request for 60-day
14 extensions, which was -- damages were granted?

15 MR. SCHAUBLE: Your Honor, there were extensions -
16 - there were certain limited extensions that were granted.
17 There were extensions requested based upon -- requested that
18 there be the -- pending ruling on an FOIA action. I think
19 the record will reflect --

20 JUDGE CHACHKIN: Go ahead with your questions.

21 BY MR. SCHAUBLE:

22 Q Mr. Kay, with respect to documents that had to be
23 produced in response to the 308(b), isn't it correct that as
24 you understood the 308(b) letter, the Commission was only
25 requesting information as to one specific period of time?

1 JUDGE CHACHKIN: I thought the original request,
2 for everything up to 1991 but --.

3 MR. SCHAUBLE: That's after designation, Your
4 Honor.

5 JUDGE CHACHKIN: All right.

6 MR. SCHAUBLE: We're trying to make the
7 distinction here.

8 JUDGE CHACHKIN: I'm sorry. Go ahead. You can
9 answer the question.

10 THE WITNESS: They wanted all my -- if you read
11 the 308(b) and you read the requests for discovery, there is
12 very little difference except that the discovery wanted
13 everything from 1991 to date, but by and large it was the
14 same information that was requested in the 308(b). Whether
15 you asked for information effective some date at my
16 convenience, if we took a current date, it would still be
17 hundreds and hundreds and hundreds upon customers. The
18 additional information that we had available that we gave
19 you was not that significantly greater.

20 As I explained to you yesterday, the accounts on
21 my computer that had canceled service prior to 1983 were
22 gone. They had already been deleted in routine purchase.
23 So the difference between giving you all of our current
24 customers as of January 31, 1994 or any date at my
25 convenience as compared to giving you all customers from

1 1991 to date that we had information on, we might have
2 talked 20 or 38 counts' difference that we would have had to
3 actually, in fact, gone to the individual work of the
4 segregating out and not giving you.

5 So if what you're asking is if directly answering
6 the 308(b) and answering discovery have made any significant
7 difference on the quantity of 38,000 documents that we
8 ultimately gave you? It might have made a couple of
9 thousand documents' difference. It would not have been
10 significantly different, if that's what you're asking me.

11 BY MR. SCHAUBLE:

12 Q Well, isn't it a fact, Mr. Kay, that the majority
13 of the 38,000 pages you produced were in the form of
14 customer files for various customers?

15 A Those were the business records you demanded via
16 the 308(b). They must be supported by billing records.
17 That's what we gave you; that's what you bought.

18 Q But isn't it a fact that -- turn to Exhibit 1, Mr.
19 Kay.

20 A Right. Paragraph six, for each --

21 MR. SHAINIS: There is no question.

22 THE WITNESS: Sorry.

23 BY MR. SCHAUBLE:

24 Q Turning to paragraph six, that did not require
25 production of all your business records, did it?

1 A All our business records are the contracts and the
2 invoices to substantiate the use of our customers. That's
3 what you asked for, and that's the same thing you asked for
4 in discovery, and that's what we gave you. The discovery
5 was, for all intents and purposes, identical to the 308(b).
6 It would have been the same final documents. That's what
7 you asked for.

8 MR. SHAINIS: I will make an objection now to
9 asking questions on what the letter meant. Since this
10 witness did not author the letter, the letter authored by
11 Mr. Hollingsworth, who would be the best person to testify
12 as to what the Commission wanted.

13 JUDGE CHACHKIN: With such an objection, it's
14 overruled.

15 MR. SHAINIS: Okay.

16 JUDGE CHACHKIN: The witness understood the
17 question, and he's answered. Go ahead.

18 BY MR. SCHAUBLE:

19 Q Wouldn't your computer data base have been a
20 business record?

21 A Conceivably, but it would not have answered this
22 308(b). You know, you brought that up to me before. I have
23 never before or subsequent supplied any information to the
24 Government on magnetic media, i.e. tape or a disk. Frankly,
25 I never thought of it, and even if I had thought of it, it

1 would not have answered this 308(b). It might have answered
2 part of it, but it still would not have produced the
3 business records, the invoices, the contracts, the work
4 sheets, or business records that you were asking for here.
5 The only entire source of the information you asked for was
6 our paper files that we copied for you that were tens of
7 thousands of documents.

8 Even if I had thought of it and I could have
9 produced it with a nearly destroyed computer system, it
10 still wouldn't have answered it. Does that answer your
11 question?

12 Q Isn't it a fact that the data base contained
13 information concerning the number of mobiles each customer
14 had?

15 A It did, but not audited, not checked for
16 correctness, and not complete. It was purely for our own
17 convenience. We didn't make it for a legal record. It was
18 purely internal convenience that it was on there.

19 Q Let me ask you, Mr. Kay, turning back to Exhibit
20 347, which is the customer print screens, --

21 A Yes.

22 Q -- was that information audited in any way prior
23 to it being produced in March 1995?

24 A Prior to producing this, myself and my staff went
25 through the computer data base, customer by customer, all

1 approximately 800 to 1,000 customers, and did our best to
2 see that this information was as correct as we could find,
3 short of trying to audit and call each and every one of our
4 customers. We checked to see if it would match up with
5 contracts as best as possible and to our personal knowledge
6 what these customers were running. We tried to make this as
7 accurate as we could. This was done before it was produced,
8 because while I had to certify something, I had to make my
9 best efforts to make sure it's correct for you.

10 Q Mr. Kay, on these customer print screens is it
11 correct that if somebody -- do I understand correctly that
12 if somebody was a paying customer between September 1993 and
13 March 1995, to the best of your knowledge, a customer print
14 screen was produced for that customer?

15 A I don't know if I could delineate it precisely the
16 way you said it. The computer data base included all our
17 customers except those that had canceled prior to
18 approximately September of 1993. That date could vary a
19 little bit, but somewhere near the end of '93 we had someone
20 come in, my guy who handled the ZENIX system, and did
21 regular purges on our system and, in effect, cleaned up our
22 ZENIX operating system. And we threw away old records of
23 canceled customers, leaving a few on in case they came back,
24 time-wise.

25 I don't know what date was the cut-off date that

1 canceled accounts were purged, but what we did to produce
2 the record was after it had been rebuilt on the DOS system,
3 as you pointed out yesterday, we turned off what we called
4 the "delete flag," which causes an account not to appear and
5 not to bill, but the data was still there. We then printed
6 out everything that was in the data base, all customers.
7 Those that are operating under their own licenses that are
8 not on my licenses or my corporate-held licenses, which is
9 what they asked for, for those licenses that I held and my
10 corporations held, we gave you every one of those customers.

11 So from the raw data base there would be customers
12 in there that were operating on their own licenses or other
13 people's stations that we were billing that did not operate
14 on my stations. Those weren't given to you because they
15 weren't asked for. They are not within the scope of the
16 discovery. But basically we gave you everything that was on
17 there that operated on my systems.

18 Q Okay.

19 A So whether they were a canceled account or an
20 active account, we gave you everything because that's what
21 you asked for.

22 Q Okay. Now, is it correct that as you stated in
23 your testimony yesterday that from time to time you would
24 have customers who would pay for the use of certain sites
25 but, in addition, receive the use of certain additional

1 sites that would not be paid for?

2 A Yes. It's been our policy, as a marketing
3 strategy, where we want customers to have additional backup
4 and additional capabilities for their system, that we will
5 sell them their primary site at full rate and give them the
6 other sites. We discovered long ago with customers that
7 example. The customer operates primarily on Mount Lukens,
8 and we also give them Sierra. If we cut their bill in half
9 and say, well, you're going to pay half for Lukens and half
10 for Sierra, the customers came back to us and said, well,
11 gee, I don't need that, and we cut the bill in half.

12 Well, to avoid those type of arguments, I long ago
13 discovered that if you charge full for the first item then
14 give the customer additional things, they will always take
15 that which is for free and won't argue with you on the
16 primary item. I used to bill \$18 for a base station and \$12
17 for mobiles. Well, I got into arguments with customers, is
18 the portable unit sitting on their desk a base station or a
19 mobile? They would fight me for the \$6 a month.

20 And I got tired of those kind of fights, so I made
21 things very simple. I charged them all \$18. They couldn't
22 argue with me any more. If I told a customer, you can have
23 as many sites as you want for the \$18 month, then they pay
24 me \$18 a month, and they would use what they needed. They
25 would no longer say, well, gee, you know, you're charging me

1 nine for this site and nine for that site. Well, I don't
2 want that second site you charged me nine for; just charge
3 me nine for the one I do want. I solved all those arguments
4 by simply giving it to them at the \$18-a-month rate and
5 giving a bunch of extras. I may be going a little wide, but
6 I'm explaining to you how and why we did it, and, yes, the
7 answer is we did give away sites for free to customers that
8 they needed. It avoided billing problems by doing it that
9 way.

10 Q My next question, Mr. Kay, is in that instance the
11 sites that the customer did not pay for, would they be
12 reflected on the customer print screen?

13 A On a lot of the older accounts, no, they were not.
14 On the more recent accounts, starting at about, I think,
15 towards the end of '93 and '94, as we put more stuff on,
16 they would start reflecting those sites on our data base.
17 Our old data base, there was no way to really do it. It was
18 modifications that were continuously made to this billing
19 program that allowed us to start doing additional capacities
20 and to put them on there. Before it could put them on
21 there, it created a problem with the way the system worked.

22 Q Okay.

23 A So, yes, there were a bunch of customers who had
24 sites that were not showing on our data base because we were
25 not billing them for them. They created a bit of a nuisance

1 to us because they called for a service call and said, well,
2 I'm on this site here; and we wouldn't have it in the data
3 base, so the technician would have to come in and say, yeah,
4 they have that, but they are not going to be billed for it,
5 and that's why it's not on there. We have tried to go
6 through our accounts and update them to reflect all that,
7 but it's a lot of work updating that kind of stuff with the
8 kind of quantity of customers we have. I don't have the
9 biggest staff to do it.

10 Q Okay. Mr. Kay, please direct your attention to
11 WTB Exhibit Number 27.

12 A Yes.

13 Q You have before you the record for WIK 376.

14 A Yes.

15 Q Turning to the fourth page of the exhibit, --

16 A Yes.

17 Q -- the frequency 507.6625.

18 A Yes.

19 Q Turning to the page before that, you see the three
20 sites listed on that authorization.

21 A Yes.

22 Q Now in customer print screens in March 1995 did
23 you provide us with any records showing that any customer
24 was operating on WIK 376?

25 A Which exhibit is that?

1 Q Exhibit 19.

2 MR. KELLER: Exhibit Number 3 is not the
3 question -- print screen.

4 MR. SCHAUBLE: Exhibit 3 is the response to
5 interrogatory.

6 BY MR. SCHAUBLE:

7 Q And, Mr. Kay, for your benefit, pages 79 and 80
8 are the pages of the exhibit that suggest the frequency
9 507.6625 Mhz.

10 A Yes.

11 Q Okay. Now, it's correct that in November of 1995,
12 in response to the Interrogatory 4, you did not provide any
13 records which would indicate that customers were operating
14 on 507.6625 from Sierra. Correct?

15 A That's correct.

16 Q Okay.

17 A There weren't anything billed for it.

18 Q Now, in March of 1995, in customer print screens,
19 did any of those records indicate that customers were
20 operating on 507.6625 Mhz from Sierra?

21 A I'd have to look through each of those print
22 screens, but they should have appeared here if they were.
23 There would have been a printout here if we were billing
24 them separately for it.

25 Q Okay.

1 A We weren't. It was averaged in.

2 Q Turn to page 79 of Exhibit 19.

3 MR. KELLER: Excuse me. I wanted to revisit again
4 the question of the relevance of this line of questioning.
5 You seem to be going through each of these things, and what
6 is the relevance about whether or not he provided the
7 business records or not? I mean, it's already been
8 testified he provided what you asked for. You're now
9 getting into whether what was provided, did it include the
10 business records, or did it not? The best explanation I got
11 yesterday from Mr. Knowles-Kellett was that this is somehow
12 relevant because of the rule adopted in the Docket 7992 or
13 whatever it is.

14 MR. SCHAUBLE: Your Honor, this relates to the
15 loading issue.

16 JUDGE CHACHKIN: That's what I thought it did.

17 MR. KELLER: But I'm still not sure if I'm
18 understanding. Are you telling me this is relevant because
19 of the rule that was adopted in that rule-making proceeding?

20 MR. SCHAUBLE: Your Honor, we need to step back
21 for a moment here. I mean, back in 1994, we virtually
22 begged Mr. Kay for loading information, and he refused to
23 provide it, and finally we went through discovery in this
24 case, we had document production, and we received these
25 customer print screens. Then we went through -- we thought

1 that we didn't have a complete response to our
2 interrogatories. We went through a motion to compel in
3 opposition --

4 JUDGE CHACHKIN: Look, I'm not interested in the
5 whole history. The questions you're asking him now relate
6 to the loading issue. Is that correct?

7 MR. SCHAUBLE: That's correct, Your Honor.

8 JUDGE CHACHKIN: All right. That's all I need to
9 know.

10 MR. SCHAUBLE: Because we have indication --

11 JUDGE CHACHKIN: That's all I need to know. It's
12 relevant, and your objection is overruled. Go ahead with
13 your questioning.

14 MR. SCHAUBLE: Your Honor, if I could just
15 elaborate just briefly, there now seems to be some claim
16 that there was additional loading over what was disclosed to
17 the Bureau in March and November of 1995. Now --

18 JUDGE CHACHKIN: What was disclosed to the Bureau
19 in March of 1995?

20 MR. SCHAUBLE: I'm sorry?

21 JUDGE CHACHKIN: What was disclosed in March of
22 1995?

23 MR. SCHAUBLE: Your Honor, for example, there's --
24 if you turn to page 79 of the exhibit, --

25 JUDGE CHACHKIN: Yeah?

1 MR. SCHAUBLE: -- for instance, this license we
2 were talking about, WIK 376 at Sierra. That's Sierra Peak.
3 If you go to Exhibit 19, which is the November 1995
4 records, --

5 JUDGE CHACHKIN: Yes.

6 MR. SCHAUBLE: -- there is a listing of customers
7 for 507.6625 Mhz at Lukens, and on page 80 a listing of
8 507.6625 Mhz at Oat Mountain, but there is nothing listed
9 for 507.6625 Mhz at Sierra or under this call sign, WIK 376.

10 JUDGE CHACHKIN: Okay. What does it explain?
11 They were nonpaying customers, or at least they weren't
12 billed for the use of that site. That's his explanation.
13 What are you saying?

14 MR. SCHAUBLE: Your Honor, we say they prove --
15 through the report and order the Commission has made clear
16 that if there is a compliance action, we have to be able to
17 substantiate the loading through records, and we've received
18 two sets of records that provide no indication whatsoever
19 that there was operation under this call sign, and now we're
20 hearing that, oh, yeah, by the way, all these customers
21 happen to be on other --

22 JUDGE CHACHKIN: Well, did you ask him in any of
23 your discovery, which was quite extensive apparently,
24 extending for over a couple of years, did you ask him the
25 question?

1 MR. SCHAUBLE: Your Honor, in the interrogatory we
2 asked with respect to each of the call signs listed in
3 Appendix A --

4 JUDGE CHACHKIN: What did you ask for?

5 MR. SCHAUBLE: -- identify each and every end
6 user, i.e., customer, and the number of mobile units of each
7 such end user, i.e., customer, since January 1, 1991 with
8 respect to each of the call signs. And he provided
9 absolutely nothing concerning the whole series of call
10 signs.

11 JUDGE CHACHKIN: Do you have any explanation, Mr.
12 Shainis and Mr. Keller?

13 MR. KELLER: Well, first, I want to know what
14 referred mobile unit are we referring to, number one.

15 MR. SCHAUBLE: I was reading from the
16 Interrogatory Number 4.

17 MR. KELLER: No, no, no, no. A moment ago you
18 said the report and order made clear that you needed this
19 information for compliance, and I wanted to know what report
20 and order. That's number one. And, number two, I wanted to
21 object to the characterization that they did not find a
22 reliable additional evidence.

23 The answer to the interrogatory expressly stated
24 several grounds on which the interrogatory was incomplete,
25 and the witness testified yesterday that what he provided

1 was the business records available to him. So the Bureau is
2 now arguing that absent other business records that he just
3 simply didn't have because of the way he did business, that
4 he is not entitled to rely on that motive. That's what they
5 said yesterday, and today they are also saying that it's
6 somehow required under a report and order that you just
7 mentioned for compliance purposes, and I'm just asking you
8 what report and order.

9 MR. SHAINIS: Your Honor, also, Mr. Kay did not
10 have to manufacture documents that were not in existence to
11 comply with the discovery request. If the documents were
12 not in existence at that time, he did not have to go through
13 extraordinary means to manufacture a document.

14 MR. SCHAUBLE: Your Honor, we're mixing apples and
15 oranges here. We're talking about an interrogatory answer
16 here. And Judge Sippel explicitly -- the rule ordered him
17 to produce this information.

18 JUDGE CHACKIN: What was the answer given?

19 MR. SCHAUBLE: There was nothing provided for this
20 call sign or a whole series of call signs.

21 MR. KELLER: It was expressly caveated, the
22 information was incomplete. You can certainly argue about
23 whether he complied with the interrogatory or not.

24 JUDGE CHACKIN: What was the answer given to the
25 interrogatories?

1 MR. KELLER: There was no loading on this call
2 sign.

3 MR. SCHAUBLE: There was no loading whatsoever.

4 JUDGE CHACHKIN: Read to me the answer.

5 MR. SCHAUBLE: Okay. The answer is in the form of
6 a series of loading reports, which is Exhibit 19. The
7 answer is Exhibit 19, Your Honor.

8 JUDGE CHACHKIN: All right. And so apparently all
9 he gave you was information related to paying customers.

10 MR. SCHAUBLE: But now you're saying there are
11 customers who were paying but that he didn't list all the
12 sites or stations those paying customers were on if they
13 didn't pay for each individual station.

14 JUDGE CHACHKIN: So he gave bonuses which they
15 could use another site, and they were not charged for that
16 site. So the impression was given that they were given free
17 of charge.

18 MR. SCHAUBLE: Your Honor, if I could read from
19 page two of the interrogatory answer. "Note: Records were
20 not kept by call sign. Information is kept by repeater
21 customer name in current configuration only. Also, case
22 records do not reflect -- shop use nor records of other
23 users in other shops who used radios at no charge, and these
24 records do not include rentals, demos, and loaners because
25 none of these records resulted in customer billing for

1 repeater services, even though use of the repeaters did
2 occur." That does not cover this situation, Your Honor.

3 JUDGE CHACHKIN: But it said something about no
4 charge, didn't it?

5 MR. SCHAUBLE: The records of other users in other
6 shops who use radios at no charge. We're talking about
7 Kay's own customers here.

8 JUDGE CHACHKIN: So what -- this is the witness's
9 testimony.

10 MR. KNOWLES-KELLETT: Your Honor, Judge Sippel had
11 said, in response to the answer, he complained after this
12 that we needed this information, too. Judge Sippel said,
13 "This is all you get. I will take no further motions to
14 compel. He is limited to what you've gotten".

15 JUDGE CHACHKIN: What did you do about it?

16 MR. SCHAUBLE: Your Honor, I mean, can't we short-
17 circuit this by a ruling that Mr. Kay cannot claim credit
18 for any loading that was not disclosed either in the
19 customer print record --

20 JUDGE CHACHKIN: I'm not going to grant that
21 motion.

22 MR. SHAINIS: Thank you, Your Honor.

23 JUDGE CHACHKIN: If you want to ask him questions
24 about how he viewed your interrogatory and put that in the
25 record, you can, but this is -- you're seeking to revoke all

1 his licenses. I'm going to go on the evidence that's
2 developed in this record. And if for some reason he didn't
3 give you this information, but this is, in fact, what's
4 happening, then certainly under the issue I'm going to
5 consider it unless you can show me by other evidence that,
6 in fact, his statements are untrue and, in fact, these sites
7 are not being used by any customers, paying or nonpaying.
8 But that burden is on you, since it's a revocation
9 proceeding, to prove it; but I'm certainly not going to
10 discount his testimony on the basis of answers to
11 interrogatories.

12 You had also a chance to depose him also
13 presumably. I said you realize that the universe could
14 include paying and nonpaying customers. I assume this is
15 not something that's new and which other Commission
16 licensees make available sites on a similar basis as Mr. Kay
17 does. I don't know, but I assume this is possible. Now,
18 you had a chance in the depositions to develop this area and
19 make clear that these are all -- each one of these sites are
20 being used and who is using them, both site by site.
21 Whether they were paying or nonpaying customers, you wanted
22 to make clear that nobody was using them. You could have
23 developed this. You did depose him after the answers to
24 interrogatories, did you not?

25 MR. SCHAUBLE: Yes, Your Honor.

1 JUDGE CHACHKIN: I don't know what his answer to
2 the depositions were. I don't know what questions you put
3 to him. Now, if you've got something in his deposition
4 which is contrary to his testimony today, then put it in.
5 Impeach him if you can.

6 MR. SCHAUBLE: The problem, Your Honor, is Judge
7 Sippel basically foreclosed us from going --

8 JUDGE CHACHKIN: In depositions.

9 MR. SCHAUBLE: He told us to drop it and --

10 JUDGE CHACHKIN: Does that mean depositions to
11 drop? It didn't preclude you from asking anything you
12 wanted in the depositions to develop it further. It said
13 drop it, insofar as answers that we're not getting over the
14 stage of these written answers to interrogatories. Now
15 you've got your depositions. Develop it further. If you
16 didn't, that's your fault, but you will have to tell me what
17 his answers, to specific deposition questions were in this
18 area. If you've got something, impeach him with it.

19 MR. SCHAUBLE: Okay.

20 MR. SHAINIS: Your Honor, can we go off the record
21 for just a few minutes? I would like to confer with Mr.
22 Schauble.

23 (Whereupon, at 11:19 a.m., a brief recess was
24 taken.)

25 JUDGE CHACHKIN: Apparently, there were three

1 volumes of depositions taken of this witness.

2 MR. SHAINIS: Four.

3 JUDGE CHACHKIN: Four. Now, if you didn't develop
4 this further, you relied solely on what the answers to
5 interrogatories, it's unfortunate. I would assume that with
6 four volumes of depositions you could have developed this
7 trial much further. If you've got something to impeach him
8 with, well, use it.

9 MR. KELLER: Are we back on the record, Your
10 Honor?

11 JUDGE CHACHKIN: Yes, we're back on the record.

12 MR. KELLER: Okay. I wanted to say, now that I
13 think we've set aside for the moment the issue of the
14 deposition -- of the interrogatory response, the line of
15 this questioning, going through each detailed record here,
16 seems to be implying that there was somehow something
17 improper in not having the business records relating to
18 these three customers or the free service of the free sites.

19 And, again, I raise the question as to what
20 regulation is that based on. The only thing that I've been
21 told -- well, I haven't been told specifically, but I'm
22 assuming from statements made by Mr. Knowles-Kellett that
23 you are referring to the rules adopted in the report and
24 order in Docket 92-79. Is that correct?

25 MR. KNOWLES-KELLETT: There are two dockets. They